FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOWARD JARVIS TAXPAYERS ASSOCIATION; JONATHAN MARK COUPAL; DEBRA A. DESROSIERS, *Plaintiffs-Appellants*, v. CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM; JOHN CHIANG, California State Treasurer, *Defendants-Appellees*.	No. 20-15591 D.C. No. 2:18-cv-01584-MCE-KJN OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr, District Judge, Presiding

Argued and Submitted February 8, 2021
San Francisco, California

Filed May 6, 2021

Before: Andrew D. Hurwitz and Daniel A. Bress, Circuit Judges, and Clifton L. Corker,* District Judge.

Opinion by Judge Bress

---

* The Honorable Clifton L. Corker, United States District Judge for the Eastern District of Tennessee, sitting by designation.

SUMMARY**

Employee Retirement Income Security Act

Affirming the district court's dismissal, the panel held that ERISA does not preempt a California law that creates CalSavers, a state-managed individual retirement account program for eligible employees of certain private employers that do not provide their employees with a tax-qualified retirement savings plan.

The panel held that Congress's repeal of a 2016 Department of Labor rule that sought to exempt CalSavers from ERISA under a safe harbor did not resolve the preemption question. Further, even if ERISA's safe harbor did not apply to CalSavers, the panel would still need to determine whether CalSavers otherwise qualified as an ERISA program.

The panel concluded that CalSavers is not an ERISA plan because it is established and maintained by the State, not employers; it does not require employers to operate their own ERISA plans; and it does not have an impermissible reference to or connection with ERISA. Nor does CalSavers interfere with ERISA's core purposes. Accordingly, ERISA does not preempt the California law.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Laura E. Dougherty (argued), Jonathan M. Coupal, and Timothy A. Bittle, Howard Jarvis Taxpayers Foundation, Sacramento, California, for Plaintiffs-Appellants.

Sharon L. O'Grady (argued), Deputy Attorney General; Paul Stein, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Office of the Attorney General, San Francisco, California; R. Bradford Huss, Joseph C. Faucher, and Angel L. Garrett, Trucker Huss APC, San Francisco, California; for Defendants-Appellees.

Peter K. Stris, Rachana A. Pathak, Douglas D. Geyser, and John Stokes, Stris & Maher LLP, Los Angeles, California; Barbara R. Van Zomeren, Ascensus LLC, Brainerd, Minnesota; for Amicus Curiae Ascensus LLC.

Dara S. Smith, and William Alvarado Rivera, AARP, Foundation Washington, D.C.; Jeffrey Lewis, Erin Riley, and Rachel E. Morowitz, Keller Rohrback LLP, Seattle, Washington; for Amici Curiae AARP, AARP Foundation, California Hispanic Chamber of Commerce, Small Business California, Small Business Majority, Unidosus, United Ways of California, and Western Center on Law and Poverty.

Ellen F. Rosenblum, Attorney General, Office of the Attorney General, Salem, Oregon; Kwame Raoul, Attorney General; Jane Elinor Notz, Solicitor General; Sarah A. Hunger, Deputy Solicitor General; Office of

the Attorney General, Chicago, Illinois; for Amici Curiae States of Illinois and Oregon.

OPINION

BRESS, Circuit Judge.

This case presents a novel and important question in the law governing retirement benefits: whether the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, preempts a California law that creates a state-managed individual retirement account (IRA) program. The program, CalSavers, applies to eligible employees of certain private employers in California that do not provide their employees with a tax-qualified retirement savings plan. Eligible employees are automatically enrolled in CalSavers, but may opt out. If they do not, their employer must remit certain payroll deductions to CalSavers, which funds the employees' IRAs. California manages and administers the IRAs and acts as the program fiduciary. Citing a need to encourage greater savings among future retirees, other States have enacted similar state-managed IRA programs in recent years. To our knowledge, this is the first case challenging such a program on ERISA preemption grounds.

We hold that the preemption challenge fails. CalSavers is not an ERISA plan because it is established and maintained by the State, not employers; it does not require employers to operate their own ERISA plans; and it does not have an impermissible reference to or connection with ERISA. Nor does CalSavers

interfere with ERISA's core purposes. ERISA thus does not preclude California's endeavor to encourage personal retirement savings by requiring employers who do not offer retirement plans to participate in CalSavers. We therefore affirm the judgment of the district court.

I

A

In 2017, the California Legislature enacted the CalSavers Retirement Savings Trust Act, which implemented the CalSavers program (previously known as "California Secure Choice"). *See* Cal. Gov't Code § 100000, *et seq.* CalSavers is a state-run IRA savings program for certain private employees. *See id.* §§ 100002, 100004, 100008. Its objective is to encourage greater retirement savings among employees whose employers do not offer retirement plans. *See* Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59464, 59464–65 (Aug. 30, 2016) (describing how California and other states have enacted "automatic enrollment" programs to "encourage employees to establish tax-favored IRAs funded by payroll deductions").

CalSavers's automatic enrollment requirement applies only to an "Eligible employee" of an "Eligible employer." Cal. Gov't Code §§ 100000(c)–(d), 100032. Eligible employees are defined as California employees who are at least eighteen years old and employed by an eligible employer. *Id.* § 100000(c); Cal. Code Regs.

tit. 10, § 10000(l), (n). Eligible employers are defined as non-governmental employers with five or more employees in California. Cal. Gov't Code § 100000(d); Cal. Code Regs. tit. 10, § 10000(m). The sole exclusion is for an "Exempt Employer," Cal. Code Regs. tit. 10, § 10000(q), that provides either an "employer-sponsored retirement plan" or an "automatic enrollment payroll deduction IRA" that "qualifies for favorable federal income tax treatment." Cal. Gov't Code § 100032(g)(1).

Compliance with CalSavers is mandatory for non-exempt eligible employers, who must register with the CalSavers program. *Id.* § 100032(b)–(d); Cal. Code Regs. tit. 10, § 10002. Exempt employers may, but are not required to, inform the CalSavers Administrator of their exemption. Cal. Code Regs. tit. 10, § 10001(d). Eligible employers who later become ineligible (for example, those who later create their own ERISA plans) must inform the CalSavers Administrator within 30 days of their change in status. *Id.* § 10001(c). Exempt employers are "prohibited from participating in the Program." *Id.* § 10002(d).

CalSavers describes itself as "a state-administered program, not an employer-sponsored program." Cal. Gov't Code § 100034(b). To that end, CalSavers forbids employers from taking a variety of actions. Employers may not "[r]equire, endorse, encourage, prohibit, restrict, or discourage employee participation in" CalSavers. Cal. Code Regs. tit. 10, § 10003(d)(1). Nor may employers advise employees regarding CalSavers contribution rates or investment decisions or "[e]xercise any authority, control, or responsibility regarding"

the program. *Id.* § 10003(d)(2), (4). Employers "are prohibited from contributing to a Participating Employee's Account." *Id.* § 10005(c)(1). Employers also "shall not have any liability for an employee's decision to participate in, or opt out of, the program"; "shall not be a fiduciary, or considered to be a fiduciary over the trust or the program"; "shall not be liable as plan sponsors"; and "shall not bear responsibility for the administration, investment, or investment performance of the program." Cal. Gov't Code § 100034(a), (b).

Anticipating the legal challenge we address here, the statute creating CalSavers maintains that "the roles and responsibilities of employers" have been defined "in a manner to keep the program from being classified as an employee benefit plan subject to the federal Employee Retirement Income Security Act [(ERISA)]." Cal. Gov't Code § 100043(b)(1)(C). CalSavers imposes three basic duties on eligible employers. They must first register for CalSavers by providing their basic identification and contact information. Cal. Code Regs. tit. 10, § 10002(f). Within thirty days of registration, they must provide CalSavers with certain contact and identifying information for their eligible employees. *Id.* § 10003(a). They must also set up "a payroll deposit retirement savings arrangement," Cal. Gov't Code § 100032(b), through which they can remit employees' contributions to the CalSavers Trust. Cal. Code Regs. tit. 10, § 10003(c). Regulations set a 5% default rate of contribution, though employees may adjust their rate. *Id.* § 10005(a)(1), (b)(1). An eligible employer that "fails to allow its eligible employees to

participate" in CalSavers is subject to penalties. Cal. Gov't Code § 100033(b).

After an eligible employer registers with CalSavers, the CalSavers Administrator delivers to all eligible employees an information packet describing the program. Cal. Code Regs. tit. 10, § 10004(a). Upon receiving the information packet, employees have thirty days to opt out; otherwise, they are automatically enrolled in CalSavers. *Id.* § 10004(b). Employees may opt out electronically, by telephone, or by mail. *Id.* § 10004(d); *see also* Cal. Gov't Code § 100032(f)(1). Even after enrollment, employees may opt out of CalSavers at any time. Cal. Code Regs. tit. 10, § 10004(d). Employees' contributions are made to a Roth IRA, *id.* § 10005(a)(3), but employees may choose to recharacterize all or some of their contributions to a traditional IRA, *id.* § 10005(c)(4). They may roll over or transfer funds into their CalSavers IRA at any time. *Id.* § 10007(b).[1]

The statute and regulations also describe how eligible employers can become ineligible for CalSavers, and how employees can make changes to their CalSavers accounts. For example, if an eligible employer later adopts its own "employer-sponsored retirement plan" or qualifying "automatic enrollment payroll deduction IRA," CalSavers no longer applies. Cal. Gov't Code § 100032(g)(1)–(2). Eligible employees are also given guidance on how they may withdraw their CalSavers

[1] We grant California's request for judicial notice of background materials on the CalSavers website.

contributions. *See id.* § 100014(b)(4). Any individual who is over eighteen can also choose to participate in CalSavers "outside of an employment relationship with an Eligible Employer." Cal. Code Regs. tit. 10, § 10006(a).

The Act that implemented CalSavers also created a nine-member California Secure Choice Retirement Savings Board, a public body "within state government," that is charged with managing and administering the CalSavers Retirement Savings Trust. Cal. Gov't Code §§ 100002, 100004. The Board is authorized to fund the Trust with the contributions received from employers through employee payroll deductions, invest the Trust funds (or delegate investment to private money managers), and pay operating costs using Trust funds. *See id.* § 100004.

California is phasing in CalSavers according to the size of an employer's workforce. *Id.* § 100032(b)–(d); Cal. Code Regs. tit. 10, § 10002(a)(1)–(3). As of October 12, 2020, California reports that 4,324 employers had registered for CalSavers and nearly 90,000 California workers had enrolled. Approximately 36% of eligible employees have opted out.

Several other states and the City of Seattle have adopted government-run auto-enrollment IRA programs like CalSavers. *See* Colorado Secure Savings Program Act, Colo. Rev. Stat. Ann. §§ 24-54.3-101, *et seq.*; Connecticut Retirement Security Exchange, Conn. Gen. Stat. Ann. §§ 31-418, *et seq.*; Illinois Secure Choice Savings Program Act, 820 Ill. Comp. Stat. Ann.

§§ 80/1, *et seq.*; Maryland Small Business Retirement Savings Program, Md. Code Ann., Lab. & Empl. §§ 12-401, *et seq.*; New Jersey Secure Choice Savings Program Act, N.J. Stat. Ann. §§ 43:23-13, *et seq.*; Oregon Retirement Savings Plan, Or. Rev. Stat. Ann. §§ 178.200, *et seq*.; Seattle Retirement Savings Plan, Seattle Mun. Code §§ 14.36.010, *et seq.*; *see also* 81 Fed. Reg. at 59464–65 (describing programs in different states); *State-Facilitated Retirement Savings Programs: A Snapshot of Program Design Features*, State Brief 20-02, Georgetown Univ. (Aug. 31, 2020), https://cri.georgetown.edu/wp-content/uploads/2018/12/CRI-State-Brief-20-02.pdf (last accessed Apr. 1, 2021).

B

Howard Jarvis Taxpayers Association and two of its employees (collectively, "HJTA") filed this action against the CalSavers program and the Chairman of the CalSavers Board in his official capacity. HJTA alleged that ERISA preempts CalSavers and that CalSavers should also be enjoined under California Code of Civil Procedure Section 526a as a waste of taxpayer funds.

HJTA is a public interest organization that seeks to promote taxpayer rights. But it filed this challenge in its capacity as a California employer. HJTA alleged that it meets the definition of an eligible employer and does not operate its own employee retirement program. HJTA therefore has standing to bring this action, and the controversy is ripe because HJTA plausibly alleges

that it will soon be subject to CalSavers. *See*, *e.g.*, *Leeson v. Transam. Disability Income Plan*, 671 F.3d 969, 978–79 (9th Cir. 2012); *Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996). The HJTA employees also have standing as future participants in what they claim is an ERISA plan. *See* 29 U.S.C. § 1132(a)(3); *Leeson*, 671 F.3d at 978–79.

The district court granted California's motion to dismiss, concluding that ERISA does not preempt CalSavers. The district court also declined to exercise supplemental jurisdiction over HJTA's state law claim. HJTA timely appealed to this Court, and we review the district court's ruling on preemption *de novo*. *Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1060 (9th Cir. 2017).[2]

II

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that ERISA covers. 29 U.S.C. § 1144(a). Is CalSavers such a law? No court has yet addressed whether a state-administered IRA program like CalSavers falls within ERISA's ambit. The issue

---

[2] After supporting HJTA in the district court, the Department of Labor (DOL) initially filed an amicus brief supporting HJTA on appeal. Later, and after a change in presidential administrations, DOL informed us that it no longer wished to participate as amicus and does not support either side. Several organizations and the States of Oregon and Illinois have filed amicus briefs supporting California.

initially seems close because ERISA's preemption provision is expansive, and CalSavers concerns benefits in a general sense. But closer inspection of the governing precedents and CalSavers' design shows that HJTA's broad ERISA preemption challenge to CalSavers cannot be sustained.

A

We first address a threshold question relating to whether Congress has already resolved this issue when it rejected a 2016 Department of Labor rule that sought to exempt CalSavers from ERISA under a safe harbor. We hold that Congress's repeal of that rule does not provide an answer to the preemption question.

DOL has issued regulations exempting certain types of plans from ERISA. *See* 29 U.S.C. § 1135 (authorizing the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter"); 29 C.F.R. §§ 2510.3-1(j), 2510.3-2(b), (d); *see generally Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 942 (9th Cir. 2008); *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1149 (9th Cir. 2000). If a plan or program is exempt from ERISA under a safe harbor, there is no need to determine whether ERISA preempts the law authorizing it.

In 1975, DOL promulgated a regulation exempting certain IRA payroll deduction programs from ERISA. *See* 29 C.F.R. § 2510.3-2(d). For an IRA program to qualify for the 1975 Safe Harbor, it must meet

four criteria: (i) "[n]o contributions are made by the employer"; (ii) "[p]articipation is *completely voluntary* for employees"; (iii) the employer's "sole involvement" is "without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions," and "to remit them to the sponsor"; and (iv) the employer receives "no consideration . . . other than reasonable compensation" for the cost of completing payroll deductions. *Id.* (emphasis added).

DOL has taken the position that the "completely voluntary" requirement in the 1975 Safe Harbor "mean[s] that the employee's enrollment in the program must be self-initiated," *i.e.*, that "the decision to enroll in the program must be made by the employee, not the employer." 81 Fed. Reg. at 59465. We have also held that when benefit coverage is "automatic for all [eligible] employees," "it [i]s not 'completely voluntary' " under the 1975 Safe Harbor. *Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

In a 2016 rulemaking, DOL concluded that state-run IRA programs like CalSavers, which require automatic participant enrollment with "opt-out" rights, were not "completely voluntary" and thus did not fall within the 1975 Safe Harbor. 81 Fed. Reg. at 59465. But DOL at the same time recognized that "states have a substantial government interest to encourage retirement savings in order to protect the economic security of their residents." *Id.* at 59464. The question remained, however, whether ERISA would preempt CalSavers and other like programs. DOL took no

position on that question in its 2016 rulemaking. *See id.* at 59467 ("The safe harbors in this section should not be read as implicitly indicating the Department's views on the possible scope of [29 U.S.C. § 1144(a)]."). But DOL recognized that "uncertainty" over ERISA preemption "has created a serious impediment to wider adoption of state payroll deduction savings programs." *Id.* at 59465.

To "remove [that] uncertainty" and promote state-run IRA programs, DOL in 2016 added a new safe harbor exemption, entitled "Savings Arrangements Established by States for Non-Governmental Employees." 81 Fed. Reg. 59464; *see also* 29 C.F.R. § 2510.3-2(h) (2016). The 2016 Safe Harbor was intended to ensure that state-run IRA programs, including CalSavers, would be treated as outside ERISA. *See* 81 Fed. Reg. 59466. For a program to qualify for the 2016 Safe Harbor, employee participation need only be "voluntary" (as opposed to "completely voluntary"), and the state had to assume fiduciary and administrative responsibility. *Id.* But the 2016 Safe Harbor was short-lived. Less than a year after its enactment, Congress repealed it by joint resolution under the Congressional Review Act. Pub. L. No. 115-35, 131 Stat. 848 (2017).

HJTA thus argues that Congress "specifically disavowed CalSavers by expressly repealing the 2016 DOL regulation that was designed to authorize CalSavers itself." We think, however, that this argument reads too much into Congress's rejection of the 2016 Safe Harbor. As we explained above, DOL in 2016 did not take the position that state IRA programs were

preempted under ERISA absent an exemption. It merely sought to "remove uncertainty" about that question, so that states could avoid the costs and delay of ERISA preemption litigation (like this one). 81 Fed. Reg. at 59466.

We can at most conclude from Congress's repeal of the 2016 regulation that Congress rejected the notion that CalSavers should be automatically exempt from an ERISA preemption analysis. Nothing about the repeal forecasts any answer, much less any definitive answer, on whether ERISA preempts programs like CalSavers. That issue was left to the courts to resolve. And that means we must address the ERISA preemption question that the 2016 Safe Harbor might have obviated or made easier.

There is one more preliminary item before we do so, however. Assuming for a moment that CalSavers does not fall within the 1975 Safe Harbor because it is not "completely voluntary," does that mean CalSavers is then covered by ERISA and preempted? In prior cases, we have made statements such as the following: "Unless *all four* of the [1975 Safe Harbor] requirements are met, the employer's involvement in a group insurance plan is significant enough to constitute an 'employee benefit plan' subject to ERISA." *Qualls*, 22 F.3d at 843; *see also*, *e.g.*, *Sarraf v. Standard Ins. Co.*, 102 F.3d 991, 993 (9th Cir. 1996) ("Because [the employee organization] is not exempted by the regulation, its involvement in the plan is significant enough to make the plan an 'employee benefit plan' subject to ERISA."); *Pacificare Inc. v. Martin*, 34 F.3d 834, 837

(9th Cir. 1994) ("A plan failing to meet any one of these [safe harbor] criteria cannot be excluded from ERISA coverage."). Do these statements mean that if a plan fails to meet the 1975 Safe Harbor, it is then an ERISA plan that ERISA preempts?

The answer is no. In *Stuart v. UNUM Life Insurance Co. of America*, 217 F.3d 1145 (9th Cir. 2000), we clarified that while "[a] program that satisfies the [safe harbor] regulation's standards will be deemed not to have been 'established or maintained' by the employer[,] [t]he converse, however, is not necessarily true; a program that fails to satisfy the regulation's standards is not automatically deemed to have been 'established or maintained' by the employer, but, rather, is subject to further evaluation under the conventional tests." *Id.* at 1153 n.4 (quoting *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995)). In other words, "[t]he fact that [a] plan is not excluded from ERISA coverage by this regulation does not compel the conclusion that the plan is an ERISA plan." *Id.* (quoting *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 463 (10th Cir. 1997)); *see also Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1230 (9th Cir. 2000) (considering the safe harbor criteria only after determining that the plan at issue fell "within the definition of" an ERISA plan).

This means that even if the 1975 Safe Harbor does not apply to CalSavers, we would still need to find that CalSavers "otherwise qualifies as an ERISA program," *Johnson*, 63 F.3d at 1133, or "relate[s] to" ERISA, 29 U.S.C. § 1144(a), to conclude that ERISA preempts it.

We therefore need not decide whether the 1975 Safe Harbor would exempt CalSavers from ERISA because we hold that CalSavers is not an ERISA plan in the first place. Nor does it "relate to" ERISA plans by imposing administrative obligations on employers in California that, like HJTA, do not offer employer-sponsored retirement plans. We now turn to an explanation of these points.

B

ERISA's preemption provision applies to "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," as defined in ERISA. 29 U.S.C. § 1144(a). While the preemption provision is "clearly expansive," the Supreme Court has cautioned that its "relate to" language cannot be read "to extend to the furthest stretch of indeterminacy," because it would then lack any limiting principle at all. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

States are not precluded from adopting a law just because it has something to do with "benefits" in a loose sense, no matter how detached the law is from ERISA's text and recognized objectives. To have "workable standards" and avoid near constant preemption ("a result [that] no sensible person could have intended"), the Supreme Court has therefore rejected "'uncritical literalism' in applying [ERISA's preemption] clause." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016) (quotations omitted).

ERISA applies to "*plans*, rather than simply to *benefits*." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). That demarcation forms the basis for the Supreme Court's cases distinguishing state laws that fall within ERISA's preemptive reach from those that are beyond it. To this end, the Court has identified "two categories of state laws that ERISA pre-empts." *Id.* "First, ERISA pre-empts a state law if it has a 'reference to' ERISA plans." *Id.* (citing *Travelers*, 514 U.S. at 656). "Second, ERISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)). HJTA has not shown that either test is satisfied.

1

If CalSavers "creates an ERISA plan," then it "almost certainly makes an impermissible 'reference to' an ERISA plan." *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 648 (9th Cir. 2008). But CalSavers does not order anyone to create an ERISA "employee benefit plan," as ERISA defines that term and as precedent elucidates that concept.

ERISA's preemption provision precludes state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). An "employee benefit plan" means either an "employee welfare benefit plan" or an "employee pension benefit plan." *Id.* § 1002(3). "Employee

pension benefit plan" is the type of plan potentially relevant to CalSavers. ERISA defines such a plan as "any plan, fund, or program which was heretofore or is hereafter *established or maintained by an employer* or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances[,] such plan, fund, or program" provides retirement income or results in deferral income by employees. *Id.* § 1002(2)(A) (emphasis added).

HJTA contends that CalSavers is an ERISA plan because it satisfies the four-factor test in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Under the *Donovan* test, an ERISA plan is established "if from the surrounding circumstances a reasonable person can ascertain [1] the intended benefits, [2] a class of beneficiaries, [3] the source of financing, and [4] procedures for receiving benefits." *Id.* at 1373.

We have used the *Donovan* factors as a benchmark for assessing whether a de facto plan is an ERISA plan. *See*, *e.g.*, *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 939 (9th Cir. 2003); *Modzelewski v. Resolution Tr. Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994); *but see Golden Gate*, 546 F.3d at 652 (questioning whether the *Donovan* factors are compatible with later Supreme Court precedent on whether an informal policy is an ERISA plan). But we have never suggested that the *Donovan* factors are the "be all and end all" for whether an arrangement is an ERISA plan. That is because the *Donovan* factors presume the existence of a threshold requirement for ERISA plans: that they be "established or maintained by an employer."

As we explained in *Golden Gate*, "satisfying the *Donovan* criteria was a necessary but not sufficient condition for the creation of an ERISA plan." 546 F.3d at 652. *Donovan* is concerned with ascertaining whether a de facto plan is an ERISA plan, once an employer decides to provide ERISA-type benefits to its employees. *See id.* (noting that *Donovan* and its progeny "all involve some type of unwritten or informal promise made by an employer to its employees"). But *Donovan* itself made clear that its criteria only come into play when "an *employer or employee organization* is the person that establishes or maintains the plan, fund, or program." 688 F.2d at 1371 (emphasis added).

The issue here is thus not whether, had an employer set up an IRA program on its own, that program would be subject to ERISA. That assumes away the central question in this appeal, which is whether a state-run IRA program like CalSavers is "established or maintained by an employer." The answer to that question is "no."

2

The ERISA-required "employer" that supposedly "established or maintained" CalSavers could only be one of two entities. The first, of course, is the State. But it seems quite clear that although California "established or maintained" CalSavers, it did not do so in the capacity of an "employer." The "established or maintained" requirement, we have explained, "appears designed to ensure that the plan is part of an

employment relationship." *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 921 (9th Cir. 2010) (quoting *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1049 (10th Cir. 1992)). And ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). California does not employ CalSavers participants, who are by definition not governmental employees. Cal. Gov't Code § 100000(c)(1), (d). California is thus not "acting directly as an employer" through CalSavers or the CalSavers Trust.

Nor is California acting "indirectly in the interest of an employer" through CalSavers. 29 U.S.C. § 1002(5). CalSavers does not purport to provide ready access to IRAs on behalf of California employers. *See Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13, 15 (2d Cir. 1995) (explaining that "indirectly" requires "some type of agency or ownership relationship or an assumption of the employer's functions with regard to the administration of an ERISA plan"); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575 (2d Cir. 1995) ("It is clear that the 'in the interest of' language encompasses those who act for an employer or directly assume the employer's duty to make plan contributions."). Nor, by its design, does CalSavers represent employers in any relevant sense. CalSavers instead steps in where the State regards eligible California employers as having failed to provide their workers with desirable retirement savings options.

We have previously held that "a trust was not an ERISA plan because it recruited 'heterogeneous, unrelated employers.' " *Moideen v. Gillespie*, 55 F.3d 1478, 1481 (9th Cir. 1995) (quoting *Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987)). The employers who are subject to CalSavers are heterogeneous and unrelated, and California has not "recruited" them at all. Indeed, employers have no say over how CalSavers is operated; they did not create it, nor do they control it.[3]

If California is not the ERISA "employer," the only other entities who could fit that bill are those eligible employers who are subject to CalSavers. These entities are, of course, "employers." HJTA argues that CalSavers effectively requires these employers to "establish or maintain" ERISA plans by conscripting them into participating in CalSavers and imposing certain obligations on them. But this argument is faithful neither to CalSavers' operation nor ERISA.

There is scant case law on when an employer's required participation in a government-mandated, government-run benefits program nonetheless leads to the employer "establishing or maintaining" an ERISA

---

[3] HJTA's reliance on *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988) (per curiam), is therefore unavailing. In *Kanne*, construction employers created an association to administer a health plan for their employees. *Id.* at 491. We held that the association qualified as an ERISA "employer," which "includes a group or association of employers acting for an employer in such capacity." *Id.* at 493 (quoting 29 U.S.C. § 1002(5)) (emphasis removed). CalSavers is not "acting for" eligible employers, nor is it a "group or association of employers."

plan. But the "establishment" of an ERISA plan requires both a "decision to extend benefits" and some "[a]cts or events that record, exemplify or implement the decision," such as "financing or arranging to finance or fund the intended benefits" or "establishing a procedure for disbursing benefits." *Donovan*, 688 F.2d at 1373; *see also*, *e.g.*, *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1442 (9th Cir. 1995). Addressing another provision of ERISA that involves "maintain[ing]" a plan, courts have relied on dictionary definitions to explain that "maintain" means to "care[ ] for the plan for purposes of operational productivity." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1226 (10th Cir. 2017); *see also Sanzone v. Mercy Health*, 954 F.3d 1031, 1041–42 (8th Cir. 2020) (similar).

The closest precedent we have to the present case is *Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008). *Golden Gate* involved a city ordinance that created a city-run "Health Access Plan" (HAP) for low-income residents to obtain health coverage. *Id.* at 642–43. Under the HAP, employers were required to spend a certain amount on healthcare each quarter, either by making payments into their own employee health plans or by making a payment directly to the city (the "City-payment option"). *Id.* at 643–46. Eligible employees could then enroll in the HAP and would be eligible for city-managed medical reimbursement accounts. *Id.* at 645.

We held that the City-payment option did not create an ERISA plan. *Id.* at 648–52. While employers

were required to comply with certain "administrative obligations" under the HAP—such as tracking employee hours, maintaining certain records, and the like—"[t]his burden [wa]s not enough, in itself, to make the payment obligation an ERISA plan." *Id.* at 650. We explained that in the context of a government-sponsored benefit in which an employer has mandatory back-end responsibilities, "an employer's administrative duties must involve the application of more than a modicum of discretion in order for those administrative duties to amount to an ERISA plan." *Id.*

Because the employer could "make no promises to its employees with regard to the HAP or its coverage" and the city was not "act[ing] as the employer's agent entrusted to fulfill the benefits promises the employer made to its employees," we concluded in *Golden Gate* that the "the City, rather than the employer, establishes and maintains the HAP." *Id.* at 654. Consistent with case law interpreting "establish" and "maintain," *Golden Gate* stands for the proposition that an employer's non-discretionary administrative obligations under a government-mandated benefit program do not, without more, "run the risk of mismanagement of funds or other abuse" by employers, which is ERISA's focus. *Id.* at 651.

Golden Gate's holding was informed by ERISA's basic objectives, which serve as a "guide to the scope of the state law that Congress understood would survive" ERISA's preemption provision. *Gobeille*, 577 U.S. at 320 (quoting *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)).

ERISA "seeks to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures." *Id.* at 320–21; *see also Fort Halifax*, 482 U.S. at 16 ("Only 'plans' involve administrative activity potentially subject to employer abuse."). When employers merely perform mandatory administrative functions in a government benefits scheme that do not require the employer to exercise "more than a modicum of discretion," *Golden Gate*, 546 F.3d at 650, the employer does not "establish or maintain" an ERISA "plan" because the employer is not engaging in the type of conduct that ERISA seeks to regulate.

Applying these principles, we conclude that in every relevant sense, it is the State that has established CalSavers and the State that maintains it—and not eligible employers. California created CalSavers. California determines the eligibility for both employers and employees. Cal. Code Regs. tit. 10, § 10000(l)–(n). California enrolls eligible employees. *Id.* § 10004. Individuals can elect to participate in CalSavers outside of the employment relationship by enrolling and making contributions via electronic funds transfer or personal check. *See* Cal. Code Regs. tit. 10, § 10006. California acts as the sole fiduciary over the trust and program, with the Board making all investment decisions (or delegating investment strategy to private managers). Cal. Gov't Code §§ 100002(d)–(e), 100004, 100034. And California is "free to change the kind and level of benefits as it sees fit." *Golden Gate*, 546 F.3d at 654. All of this confirms that "the [State], rather than

the employer, establishes and maintains" CalSavers. *Id.*

That CalSavers imposes certain administrative duties on eligible employers does not mean that eligible employers complying with those obligations "establish or maintain" ERISA plans. The role for eligible employers is limited to registering for the program; evaluating employee eligibility according to non-discretionary criteria; providing the State with employee identification and contact information; and processing specified payroll deductions according to set formulae. Cal. Code Regs. tit. 10, §§ 10002, 10003(a)–(c). The types of determinations employers must make under CalSavers are essentially mechanical, such as which of their employees are eighteen or older, how many people they employ, and so on. *See id.* §§ 10000(l)–(m), 10001, 10002.

It is of course true that if the State mandated that private employers provide certain retirement benefits to their employees, this would violate ERISA. *See Fort Halifax*, 482 U.S. at 16 (agreeing that requiring employers to create benefit plans "would permit States to circumvent ERISA's pre-emption provision, by allowing them to require directly what they are forbidden to regulate"). The considerations would also likely be different if employers were making discretionary judgments within a state-mandated benefits scheme.

But California has not done anything like this in CalSavers. HJTA cites no authority suggesting that the non-discretionary administrative involvement that CalSavers requires of employers is enough to mean the

employers have thereby "established or maintained" ERISA plans. As we explained in *Golden Gate*, "[m]any federal, state and local laws, such as income tax withholding, social security, and minimum wage laws, impose similar administrative obligations on employers; yet none of these obligations constitutes an ERISA plan." 546 F.3d at 650.

In suggesting that employers have a more substantive role in CalSavers, HJTA misstates the statutory scheme. HJTA claims, for example, that under CalSavers "the employer is managing the employee's money." But it is the CalSavers Board that does this. Cal. Gov't Code §§ 100002(d)–(f), 100010. And employers are prohibited from "[e]xercis[ing] any authority, control, or responsibility regarding the Program," except for specifically identified administrative duties. Cal. Code Regs. tit. 10, § 10003(d)(4).

HJTA also asserts that under CalSavers, employers are "obligated" to provide their employees with "guidance and opinions" and are "mandated to endorse CalSavers." But again, CalSavers in fact disallows this. Under CalSavers, eligible employers "shall not" "[r]equire, endorse, encourage, prohibit, restrict, or discourage employee participation in the Program." *Id.* § 10003(d)(1). Nor may they "[p]rovide Participating Employees . . . advice or direction regarding investment choices, Contribution Rates, participation in Automatic Escalation, or any other decision about the Program." *Id.* § 10003(d)(2). The CalSavers scheme does not give employers the expansive, discretionary role that HJTA suggests. *Cf. Simas v. Quaker Fabric*

Corp. of Fall River, 6 F.3d 849, 853 (1st Cir. 1993) (holding that ERISA preempted state law that required employers to make eligibility determinations "likely to provoke controversy and call for judgments based on information well beyond the employee's date of hiring and termination"). While some employers may find CalSavers irritating or even burdensome, that does not make their involvement in CalSavers tantamount to establishing or maintaining an ERISA plan. *See Golden Gate*, 546 F.3d at 650.[4]

Finally, HJTA errs in claiming that CalSavers forces employers to create ERISA plans because it is the employer's initial decision not to offer a tax-qualified retirement savings program that then requires it to comply with CalSavers. While HJTA's lack of a retirement plan made it subject to CalSavers, it does not follow that HJTA thereby "established or maintained" an ERISA plan. That a regulated entity is complying with a mandatory state scheme does not mean the entity "establishes or maintains" the program established by that scheme. In no sense does an eligible employer "establish or maintain" an ERISA plan through its

[4] HJTA argues that small employers subject to CalSavers may inadvertently establish ERISA plans if they drop below five employees. This argument is not persuasive. There is no basis for HJTA's claim that it will be "tricky" for employers to know whether they have fewer than five employees. *See* Cal. Code Regs. tit. 10, § 10001(a) (method of calculating number of employees). And if an employer's average number of employees falls below five for a calendar year, that does not mean its compliance with CalSavers then produces an ERISA plan; it merely means the employer is no longer subject to CalSavers. *See id.* § 10001(b).

decision *not* to establish such a plan, which is what triggers CalSavers' application.

3

Having concluded CalSavers is not an ERISA plan and does not require employers to establish or maintain one, we now turn to whether CalSavers otherwise "relates to" ERISA benefit plans because it has a forbidden "reference to" or "connection with" such plans. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 479 (2020). We hold that HJTA's preemption challenge fails under these tests.

A state law impermissibly "refers to" ERISA "if it 'acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation.'" *Id.* at 481 (quoting *Gobeille*, 577 U.S. at 319–20). A state law has an impermissible "connection with" ERISA if it "governs a central matter of plan administration or interferes with nationally uniform plan administration," such as "by requiring payment of specific benefits or by binding plan administrators to specific rules for determining beneficiary status." *Id.* at 480 (quoting *Gobeille*, 577 U.S. at 320) (citations omitted).

HJTA has not shown that CalSavers runs afoul of ERISA in these ways. CalSavers specifically exempts those employers that "provide[] an employer-sponsored retirement plan" or "an automatic enrollment payroll deduction IRA" if "the plan or IRA qualifies for favorable federal income tax treatment under the federal

Internal Revenue Code." Cal. Gov't Code § 100032(g)(1); *see also* Cal. Code Regs. tit. 10, § 10000(q) (including in the definition of "Exempt Employer" any employer that "maintains or contributes to a Tax-Qualified Retirement Plan"); *id.* § 10000(z) (defining "Tax-Qualified Retirement Plan"). HJTA thus forthrightly acknowledges that employers who provide their employees with ERISA-governed retirement plans are not subject to CalSavers.

What this means is that CalSavers does not "act on ERISA plans at all, let alone immediately and exclusively." *Golden Gate*, 546 F.3d at 657. CalSavers does not regulate ERISA plans or the benefits provided under them. Employers that offer such plans are not "force[d] . . . to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all." *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996); *see also Golden Gate*, 546 F.3d at 655 (holding that the HAP was not "in connection with" ERISA because it did not "require any employer to provide specific benefits through an existing ERISA plan or other health plan"). If an employer has an existing ERISA plan or later chooses to adopt one, CalSavers has nothing to say about those plans or their administration. Nothing in law supports HJTA's effort to recast ERISA's preemption provision as a sword that would allow employers who do not offer their own retirement plans to

thereby deprive their employees of the ability to participate in a state-run IRA savings program.[5]

HJTA maintains that CalSavers nonetheless "competes with" ERISA plans and will "frustrate, not encourage the formation of" ERISA plans. Even if this were true, it does not matter. The Supreme Court has been clear that "ERISA does not pre-empt" state laws that "merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." *Rutledge*, 141 S. Ct. at 480 (citing *Travelers*, 514 U.S. at 668). It may be that CalSavers will incentivize employers to cancel their existing ERISA plans, lead them to create ERISA plans to compete with CalSavers, or otherwise influence the benefits employers offer. But these forms of

---

[5] In its since-withdrawn amicus brief, the DOL agreed that employers with "ERISA-covered retirement plans are exempt from CalSavers." But it asserted in a footnote that employers that offer a non-automatic IRA retirement program may be covered by ERISA but "may also" be subject to CalSavers, because CalSavers provides that "[a]n employer-provided payroll deduction IRA program that does not provide for automatic enrollment" is not exempt from CalSavers. We have no occasion to consider this issue because HJTA does not offer its employees any ERISA-governed plan at all. We express no opinion on whether ERISA would preempt CalSavers insofar as it applies to employers with existing ERISA plans, assuming such a circumstance exists. We also reject as speculative HJTA's claim that California has set itself up as an "alternative adjudicator of ERISA compliance" in assessing employer exemption from CalSavers. We do not have before us a dispute between an employer and the State over whether an employer is exempt from CalSavers. We therefore do not opine on the preemption implications, if any, that such a situation could present.

" 'indirect economic influence' d[o] not create an impermissible connection between" CalSavers and ERISA because CalSavers "d[oes] not 'bind plan administrators to any particular choice.' " *Id.* (quoting *Travelers*, 514 U.S. at 659).

This leaves HJTA arguing that ERISA preempts CalSavers because it is "ERISA-regarding," in that California law keys eligibility for CalSavers on whether an employer offers an ERISA plan. But that argument relies on the very "uncritical literalism" that the Supreme Court has rejected in interpreting ERISA's preemption provision. *Gobeille*, 577 U.S. at 319.

As we have previously explained, and as remains true today, "[t]he Supreme Court . . . has never found a statute to be preempted simply because its text included the word ERISA or explicitly mentioned" ERISA plans. *WSB Elec., Inc.*, 88 F.3d at 793; *see also Hattem v. Schwarzenegger*, 449 F.3d 423, 432 (2d Cir. 2006); *NYS Health Maint. Org. Conf. v. Curiale*, 64 F.3d 794, 800 (2d Cir. 1995). Although the Supreme Court has held that ERISA preempted state statutes when they "expressly refer[red] to ERISA plans," these state laws "also had some effect on those plans." *WSB Elec., Inc.*, 88 F.3d at 793. Because CalSavers does not act on ERISA plans or ERISA benefits, we do not see how CalSavers' explicit effort to wall off ERISA plans from its ambit could somehow turn out to be the very feature that leads to preemption. Nothing in principle or precedent supports such a strange result.

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), on which HJTA relies, is not to the contrary. In *Mackey*, the Supreme Court held that ERISA preempted a Georgia law that specifically exempted ERISA benefits from state garnishment procedures. *Id.* at 828–29. But the law in *Mackey* did more than just expressly refer to ERISA plans: it "solely applie[d]" to ERISA plans and "single[d] out ERISA employee welfare benefit plans for different treatment." *Id.* at 829–30. That is, by exempting ERISA benefits from what was a generally applicable garnishment scheme that could otherwise apply to ERISA benefits, *see id.* at 830, the Georgia exception "act[ed] immediately and exclusively upon ERISA plans," *Dillingham*, 519 U.S. at 325 (describing the state law in *Mackey* in these terms).

The effective ERISA reference in the CalSavers exemption, by contrast, confers no such "special treatment" on ERISA benefits because it does not operate on those benefits at all. *Mackey*, 486 U.S. at 838 n.12. Unlike the Georgia garnishment exception in *Mackey*, CalSavers was not "specifically designed to affect employee benefit plans." *Id.* at 829 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47–48 (1987)).

CalSavers is instead more akin to the exemption at issue in *Washington Physicians Service Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998), *as amended on denial of reh'g and reh'g en banc* (Aug. 24, 1998). In *Gregoire*, a statute that regulated "health plan[s]" excluded employer-sponsored plans from its ambit. *Id.* at 1043. We rejected a preemption challenge similar to

the one HJTA raises here because the law did not "operate directly" on ERISA plans. *Id.* at 1044. "In plain English," we explained, if the employer were to operate its own ERISA health benefit plan, "the Act would not apply at all, and [the employer] could structure its benefits in any way it chose." *Id.* at 1043. The same reasoning follows for CalSavers: if an employer offers its own retirement plan, CalSavers does not apply. And CalSavers does not otherwise address how the employer may structure its retirement benefits.

HJTA's reliance on *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), is also misplaced. In *Greater Washington*, the Supreme Court held that ERISA preempted a District of Columbia law that required employers who provided health insurance to their employees under an ERISA welfare benefit plan to provide "equivalent" coverage for injured employees eligible for workers' compensation, who were subject to plans exempted from ERISA. *Id.* at 126–28. In effect, the D.C. law required employers to extend their ERISA-governed health plans to another class of claimants. *See Curiale*, 64 F.3d at 800.

Because the D.C. law in *Greater Washington* applied only to employers with ERISA-governed plans, 506 U.S. at 130, "the existence of ERISA plans [wa]s essential to the law's operation," *Dillingham*, 519 U.S. at 325 (describing *Greater Washington*). That is not the case here because CalSavers operates where employers do *not* offer ERISA retirement plans. Unlike the D.C. law in *Greater Washington*, CalSavers "does not tell employers how to write their ERISA plans." *WSB*

Elec., Inc., 88 F.3d at 793–94 (quoting *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1041 (9th Cir. 1994)). Moreover, while the D.C. law "impose[d] requirements by reference" to ERISA-covered plans, *Greater Washington*, 506 U.S. at 130–31, CalSavers ensures that employers with ERISA plans are *not* subject to additional requirements. In fact, employers who already offer qualifying plans do not even have to notify California of their exemption from CalSavers. Cal. Code Regs. tit. 10, § 10001(d).

Our decision in *WSB Electric* is instructive here. In that case, California passed a prevailing wage law, which required public works contractors to pay a minimum wage to their employees. *Id.* at 790. To comply, the contractor had to either pay the entire prevailing wage in cash or pay a base cash wage and receive credit for certain benefit contributions. *Id.* The law expressly referred to ERISA plans in determining how much credit the employer could receive for the benefit contributions. *Id.* at 793. But we rejected the argument that a reference to ERISA plans, standing alone, meant that the California wage law was preempted, because "[t]he references to ERISA plans in the California prevailing wage law have no effect on any ERISA plans." *Id.* HJTA's preemption challenge similarly identifies no effect on existing ERISA plans.

Finally, HJTA argues that multi-state employers will be forced to comply with "differing pension plan requirements in different states," contrary to ERISA's purpose of ensuring uniform rules for plan administration. But HJTA once again misstates what CalSavers

requires. Employers' own retirement plans remain subject to one uniform law: ERISA. The ministerial obligations CalSavers imposes on eligible employers do not resemble the establishment or maintenance of an ERISA plan. And while HJTA protests that every state may now enact its own version of CalSavers, subjecting multi-state employers to many sets of laws, that circumstance is merely a function of our federal system, little different than the varying state laws in other areas to which employers are already subject.

There is, to be sure, an important policy debate here. California steadfastly maintains that CalSavers is needed to address a serious shortfall in retirement savings that, if not addressed, will impose significant costs on the State years down the line. HJTA seemingly believes that state-run IRA programs reflect too great a role for government in private decision-making, while imposing too many costs on employers. But these are issues for California's lawmakers and those who elect them, or for Congress should it choose to take up this issue. The question for us is whether Congress has already outlawed CalSavers. For the reasons we have explained, HJTA's ERISA preemption challenge fails.

* * *

The judgment of the district court is therefore

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, JONATHAN COUPAL, and DEBRA DESROSIERS, Plaintiffs, v. THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM and JOHN CHIANG, in his official capacity as Chair of the CALIFORNIA SECURE CHOICES RETIREMENT SAVINGS INVESTMENT BOARD, Defendants.	No. 2:18-cv-01584-MCE-KJN **MEMORANDUM AND ORDER** (Filed Mar. 10, 2020)

The Howard Jarvis Taxpayers Association ("HJTA") and individually named HJTA employees Jonathan Coupal and Debra Desrosiers ("HJTA Employees") (collectively, "Plaintiffs") filed this action against the California Secure Choice Retirement Savings Program ("CalSavers" or "the Program") and California State Treasurer John Chiang (collectively, "Defendants") contending that the Employee Retirement Income Security Act ("ERISA" or "the Act") preempts the Program.

Plaintiffs' Complaint was dismissed with leave to amend. Mem. and Order, ECF No. 24 ("Prior Order").

They subsequently filed the First Amended Complaint ("FAC") requesting two forms of relief: first, a declaratory judgment that CalSavers is preempted by ERISA; and second, an injunction pursuant to California Code of Civil Procedure § 526a to permanently enjoin spending of taxpayer funds on the Program. Presently before the Court is Defendants' second Motion to Dismiss ("Present Motion") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending, in part, that CalSavers is not an ERISA plan and thus is not preempted. ECF No. 30.

While Plaintiffs were given an opportunity to amend their complaint, this matter again coalesces around the single narrow question addressed in the Prior Order: does CalSavers, a state-mandated auto-enrollment retirement savings program, create an "employee benefit plan," such that it is preempted by ERISA? For the reasons set forth below, this Court again finds that it does not and therefore GRANTS Defendants' Motion to Dismiss.[1]

BACKGROUND[2]

Congress enacted ERISA in 1974 "to promote the interests of employees and their beneficiaries in

[1] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Local Rule 230(g).

[2] Except where noted otherwise, the following recitation of facts is taken from this Court's Prior Order (ECF No. 24) as well as the parties' pleadings on this Motion.

employee benefit plans" and to "eliminate the threat of conflicting or inconsistent State and local regulation of employee benefit plans." Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 676 (9th Cir. 1998) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 99 (1983)); see also ERISA, 88 Stat. 832, as amended, 29 U.S.C. §§ 1001–1461. While ERISA does not require employers to provide any minimum set of benefits to employees, if such plans are "established or maintained . . . by any employer," they must conform to various reporting and fiduciary requirements of the Act. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 651 (1995). Regarding ERISA's effect on State statutes, it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a).

Defendants contend that in recent years a growing number of citizens lack sufficient retirement income. In response, several states began exploring state-run retirement savings programs. In 2012, the California Legislature passed the California Secure Choice Retirement Savings Trust Act, which created the CalSavers program to address the lack of retirement savings for many of the state's citizens. Cal. Gov't Code §§ 100000–100050. CalSavers creates a State-sponsored retirement savings plan for California employees who do not have access to an employer-provided plan. Id. § 100000(b)–(d). The Program is designed and implemented by the California Secure Choice Retirement Savings Investment Board (the "Board") and contributions are placed

in the California Secure Choice Retirement Savings Trust (the "Trust"), which is administered by the Board. Id. §§ 100002(e), 100004.

The Program requires an "Eligible employer"[3] to "allow employee participation in the [CalSavers] program" via payroll deductions if that employer does not offer a retirement savings program of its own. Id. § 100032(b)–(d). Eligible employers must automatically enroll their employees and remit payroll deductions to the Program "unless the employee elects not to participate." Id. § 100032(f)(1). That is, employees of Eligible employers are automatically enrolled, but can "opt out" of CalSavers if desired.

Plaintiffs filed their Complaint on May 31, 2018 (ECF No. 1), and Defendants moved to dismiss on July 25, 2018 ("Prior Motion"). ECF No. 9. Subsequently, this Court granted the Prior Motion, finding that: (1) the HJTA had standing as an "Eligible employer" but the HJTA Employees lacked standing as California taxpayers; (2) the case is ripe for adjudication; (3) CalSavers is not entitled to the exemptions set forth in a 1975 regulatory safe harbor ("1975 Safe Harbor"); and (4) CalSavers is not preempted by ERISA because

---

[3] "Eligible employer" is defined as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, excluding the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities, that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement." Id. § 100000(d)(1).

it does not govern a central matter of an ERISA plan's administration, nor does it interfere with nationally uniform plan administration. See generally Prior Order, ECF No. 24.

While this Court granted the Prior Motion with one final leave to amend, it noted that amendment would inevitably be futile as CalSavers is not subject to preemption under ERISA. Plaintiffs nonetheless filed the FAC on April 11, 2019, alleging similar claims to those in their original Complaint. ECF No. 25. Subsequently, Defendants moved to dismiss via the Present Motion on May 28, 2019, and this matter has been fully briefed. ECF Nos. 30, 37, 38. On September 13, 2019, the United States filed a Statement of Interest opposing Defendants' Present Motion, and both Plaintiffs and Defendants filed responses. ECF Nos. 43, 47, 48.

STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the

litigation, through a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int'l Union of Operating Eng'rs v. Cty. of Plumas, 559 F.3d 1041, 1043–44 (9th Cir. 2009). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." Id.; see Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack, and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the allegations of jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. Id.

When a party makes a facial attack on a complaint, the attack is unaccompanied by supporting evidence, and it challenges jurisdiction based solely on the pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to dismiss constitutes a facial attack, the Court must consider the factual allegations of the complaint to be true, and determine whether they establish subject matter jurisdiction. Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). In the case of a facial attack, the motion to dismiss is granted only if the nonmoving party fails to allege an element

necessary for subject matter jurisdiction. Id. However, in the case of a factual attack, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Safe Air for Everyone, 373 F.3d at 1039.

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." Thornhill, 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction does exist, and must present any necessary evidence to satisfy this burden. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the mere assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may review any evidence necessary, including affidavits and testimony, in order to determine whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its burden and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

B. Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to `give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to

relief." Twombly, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright & Miller, supra, at 94, 95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

C. Leave to Amend

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest

weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility. . . .")).

ANALYSIS[4]

As stated in this Court's previous Order, "the heart of the parties' dispute lies in [the] preemption arguments." Prior Order, ECF No. 24, at 12:14. Generally, ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a) (emphasis added). In the FAC, Plaintiffs reallege that CalSavers creates an employee benefit plan preempted by ERISA. The Court first addresses whether CalSavers is an

[4] As a preliminary matter, Plaintiffs ask the Court to reconsider whether the HJTA Employees have individual taxpayer standing. FAC ¶ 29. As this Court previously discussed, individuals cannot assert taxpayer standing to gain access to Federal Court. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 477 (1982); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).

employee benefit plan, then turns to an analysis of whether CalSavers relates to an ERISA plan.[5]

A. CalSavers is Not an Employee Benefit Plan Under ERISA.

The term "employee benefit plan" is defined as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). An "employee pension plan" is "any plan, fund, or program . . . established or maintained by an employer" that provides retirement income to employees. 29 U.S.C. § 1002(2)(A)(i). The Court

---

[5] The Court is cognizant that Defendants assert two additional arguments. First, they contend that CalSavers establishes an individual retirement account ("IRA") exempt from ERISA. Defs.' Mot. Dismiss, ECF No. 30, at 6:6–7; see Cal. Gov't Code § 100008. "[F]ederal regulations clarify that so long as the involvement of an employer or employee organization is strictly limited, the term[ ] 'employee pension benefit plan' . . . shall not include an [IRA] described in section 408(a) of the [Internal Revenue] Code. . . ." Charles Schwab & Co., Inc. v. Debickero, 593 F.3d 916, 919 (9th Cir. 2010) (citing 29 C.F.R. § 2510.3–2(d)(1)) (internal quotation marks omitted). Second, they again contend that CalSavers is subject to the exemptions afforded by the 1975 Safe Harbor, which exempts certain IRA plans. Defs.' Mot. Dismiss, ECF No. 30, at 11–12. However, the parties again dispute whether an employee's participation is "completely voluntary," a question considered by the Court in its Prior Order. Prior Order, ECF No. 24, at 12–13. For the reasons outlined in that order, the Court again declines to hold that CalSavers is entitled to the exemptions set forth in the 1975 Safe Harbor. No further analysis is warranted on either question, however, because ERISA coverage depends upon the level of employer involvement in employee benefit plans, which means neither of these issues is dispositive.

will first discuss whether the Board and Trust are employers under ERISA, then turn to whether CalSavers is established or maintained by an employer.

1. The Board and Trust Are Not Employers Under ERISA Because They Do Not Act Directly or Indirectly in the Interest of an Employer.

As defined in ERISA, an "employer" means "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). The parties concede that actual employers are "employers" under ERISA, but Plaintiffs further assert that the Board and Trust are employers "because a 'trust' is a 'person' who is 'acting . . . indirectly in the interest of an employer.'"[6] FAC ¶ 20.

Plaintiffs primarily rely on Kanne v. Conn. Gen. Life Ins. Co., where construction industry employers established a trust pursuant to ERISA requirements and offered group health insurance benefits to employees that were administered by an employer association. 867 F.2d 489, 491 (9th Cir. 1988). The court held that the association administering the trust could "be

[6] The Court notes that Plaintiffs broadly refer to both the Board and Trust as ERISA employers, but their analysis is limited to the Trust only. Compare FAC ¶ 20, with Pls.' Opp., ECF No. 37, at 12–13.

an ERISA employer" under the definition laid out in 29 U.S.C. § 1002(5). Id. at 493.

Plaintiffs' use of Kanne, however, is unpersuasive. As Plaintiffs point out, the Ninth Circuit did not analyze whether the trust was an ERISA employer and as such, Kanne does not provide any insight as to whether the Trust here is an "employer." Pls.' Opp., ECF No. 37, at 13:22–24. Furthermore, unlike the trust in Kanne, which was administered by an association of employers, the Trust in this case is administered by the state-created Board, not a group of employers. As such, the Court declines to find that the Board and Trust are "employers" under ERISA. The analysis does not end here, as the Court must still determine whether CalSavers is "established or maintained" by actual employers.

2. Actual Employers Neither Establish nor Maintain CalSavers.

A plan, fund, or program under ERISA must be established or maintained by an employer.[7] 29 U.S.C. § 1002(2)(A). The Ninth Circuit has held that "an

[7] Plaintiffs and the United States ask the Court to find that CalSavers constitutes an ERISA plan under the test set forth in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). See FAC ¶ 20; U.S. Statement of Interest, ECF No. 43, at 10 n.2. However, as the Court previously discussed, the Ninth Circuit has declined to apply Donovan to government mandates on employers and has expressed hesitation in applying the test where "employers made no promises whatsoever to its employees. . . ." Prior Order, ECF No. 24, at 15; see also Golden Gate Rest. Ass'n v. City & Cty. of S.F., 546 F.3d 639, 652 (9th Cir. 2008).

employer's administrative duties must involve the application of more than a modicum of discretion in order for those duties to amount to an ERISA plan." Golden Gate, 546 F.3d at 652. An employer's decision in exercising ministerial duties does not rise to the level of discretion required to be an ERISA fiduciary. Az. State Carpenters Pension Tr. Fund v. Citibank, 125 F.3d 715, 722 (9th Cir. 1997). Additionally, an employer who makes no promises to its employees regarding an employee benefit plan or its coverage is not considered to have established or maintained such plans. See Golden Gate, 546 F.3d at 654.

Plaintiffs argue that even if the Board and Trust are not "employers" under ERISA, CalSavers requires thousands of actual employers to create their own separate ERISA plans. Pls.' Opp., ECF No. 37, at 19:3–10. The Court disagrees. See Cal. Gov't Code § 100034(b) ("The [P]rogram is a state-administered program, not an employer-sponsored program."). Actual employers have no discretion in the administration of CalSavers and do not make any promises to employees: employers simply remit payroll deducted payments to the Program and otherwise have no discretion regarding the funds. Cal. Gov't Code § 100000(h); see Golden Gate, 546 F.3d at 650 ("It is within the exercise of [] discretion that an employer has the opportunity to engage in the mismanagement of funds and other abuses with which Congress was concerned when it enacted ERISA.").

Plaintiffs also refer to the phrase "maintenance mode" on the CalSavers website as an admission that

each actual employer will be maintaining its own ERISA plan. Pls.' Opp., ECF No. 37, at 18:28. However, the term "maintenance mode" is limited to "submitting contributions and adding new employees." Ex. E, FAC. The role of actual employers in CalSavers is limited to providing a roster of eligible employees, providing contact information of eligible employees, making payroll deductions, and remitting such deductions. See Golden Gate, 546 F.3d at 651 (finding ERISA did not preempt city ordinance requiring employers to track employees' hours, calculate payment amounts, and remit payments to healthcare programs). Such ministerial duties do not rise to the level of an employee benefit plan established or maintained by actual employers.

Based on the foregoing, CalSavers is not an ERISA plan as defined in 29 U.S.C. § 1002(2)(A) because it is not a plan which is established or maintained by an employer. The only question that remains is whether CalSavers is preempted by ERISA because it "relates to" an ERISA plan.

B. CalSavers Does Not Relate to an ERISA Plan.

A state law is preempted by ERISA if it "relates to" an employee benefit plan. 29 U.S.C. § 1144(a). A law "relates to" an ERISA plan if it has a connection with or reference to such a plan.[8] Cal. Div. of Labor Stds.

---

[8] Plaintiffs assert that CalSavers' express reference to ERISA, even in an attempt to avoid ERISA preemption, is "no less of a preempting reference." Pls.' Opp., ECF No. 37, at 21:8–9; see

Enf't v. Dillingham Constr. N.A., 519 U.S. 316, 324 (1997). The Court first examines whether CalSavers has a reference to an ERISA plan, then turns to whether CalSavers has a connection with such a plan.

1. CalSavers Does Not Have an Impermissible "Reference To" ERISA Plans.

A state law has an impermissible "reference to" an ERISA plan if "(1) the law 'acts immediately and exclusively upon ERISA plans,' or (2) 'the existence of ERISA plans is essential to the law's operation.'" Golden Gate, 546 F.3d at 657 (citing Dillingham, 519 U.S. at 325). Plaintiffs argue that the Program's reliance on the existence or non-existence of ERISA plans constitutes an impermissible reference. Pls.' Opp., ECF No. 37, at 21:18–25. While CalSavers applies only when actual employers do not have an existing ERISA or employer-sponsored retirement plan, the Program does not interfere with existing ERISA or retirement plans provided by actual employers. Cal. Gov't Code § 100032(g)(1) ("An employer that provides an employer-sponsored retirement plan . . . shall be exempt from the requirements of [CalSavers]."); see Golden Gate, 546 F.3d at 659 ("Where a law is fully functional even in the absence of a single ERISA plan, . . . it does

---

also D.C. v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129 (1992). However, recent Supreme Court cases have rejected such a broad and literal application of ERISA preemption. See Travelers, 514 U.S. at 655; Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016).

not make an impermissible reference to ERISA plans."). Therefore, CalSavers does not have an impermissible "reference to" ERISA plans.

2. CalSavers Does Not Have an Impermissible "Connection With" ERISA Plans.

A state law has an impermissible "connection with" ERISA if that law " 'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.' " Gobeille, 136 S. Ct. at 943 (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001)). This Court previously found that "because the Program only applies to employers without existing retirement plans, no ERISA plans are 'governed' or 'interfered' with because of the statute." Prior Order, ECF No. 24, at 14:2–4.

Plaintiffs, as well as the United States, ask this Court to reconsider its prior determination in light of the Supreme Court's holding in Gobeille. In that case, a Vermont statute required health insurers, including ERISA plans, to disclose "payments relating to health care claims and other information relating to health care services" for a state database. Id. at 940. The Court held the statute was preempted by ERISA because the disclosure requirement interfered with the nationally uniform plan administration and regulatory reporting domain of ERISA. Id. at 946.

Gobeille differs from the present matter because CalSavers does not impose additional reporting

requirements on existing ERISA plans. The information provided by participating employers does not interfere with ERISA's regulatory domain because reporting is only required where no ERISA or any other employer-sponsored retirement plan exists. There are no additional burdens or requirements imposed by CalSavers on existing ERISA or employer-sponsored retirement plans which interfere with ERISA's regulatory domain or govern any central matter of plan administration. See S. Cal. IBEW-NECA Trust Funds v. Std. Indus. Elec. Co., 247 F.3d 920, 925 (9th Cir. 2001) ("California's statute . . . imposes no new reporting, disclosure, funding, or vesting requirements for ERISA plans. [Nor does it] tell employers how to write ERISA benefit plans or how to determine ERISA beneficiary status. . . ."). As such, there is no impermissible "connection with" an ERISA plan which results in the preemption of CalSavers.

In sum, the Court finds that CalSavers is neither an employee benefit plan nor does it relate to an ERISA plan. On these grounds, the Court concludes that CalSavers is not preempted by ERISA and accordingly, Defendants' Present Motion is GRANTED.[9]

---

[9] Under Federal Rule of Evidence 201, a court may take judicial notice of matters which are "not subject to unreasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). For purposes of the Present Motion, Defendants' Requests for Judicial Notice, ECF Nos. 31 and 39, are GRANTED.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss (ECF No. 30) is GRANTED.[10] Because CalSavers is not subject to preemption under ERISA and Plaintiffs' FAC is substantially similar to their original Complaint, the Court further finds that providing Plaintiffs leave to amend would be futile. Accordingly, Plaintiffs' claims are hereby DISMISSED without leave to amend. The Clerk of the Court is directed to enter judgment in favor of Defendants and to close the case.

IT IS SO ORDERED.

Dated: March 10, 2020

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

[10] The Court declines to exercise supplemental jurisdiction over the remaining state law claim.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.,

v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM, ET AL.,

JUDGMENT IN A CIVIL CASE

CASE NO: **2:18–CV–01584–MCE–KJN**

(Filed Mar. 10, 2020)

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 3/10/2020

Keith Holland
Clerk of Court

ENTERED: **March 10, 2020**

by: /s/ H. Huang
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, JONATHAN COUPAL, and DEBRA DESROSIERS, Plaintiffs, v. THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM and JOHN CHIANG, in his official capacity as Chair of the CALIFORNIA SECURE CHOICES RETIREMENT SAVINGS INVESTMENT BOARD, Defendants.	No. 2:18-cv-01584-MCE-KJN **MEMORANDUM AND ORDER** (Filed Mar. 29, 2019)

The Howard Jarvis Taxpayers Association ("HJTA") and individually named HJTA employees Jonathan Coupal and Debra Desrosiers ("HJTA Employees") (collectively, "Plaintiffs") filed this action against the California Secure Choice Retirement Savings Program ("CalSavers" or "the Program") and California State Treasurer John Chiang ("Treasurer") (collectively, "Defendants") contending that the Employee Retirement Income Security Act ("ERISA" or "the Act") preempts the Program. Plaintiffs' Complaint requests two forms of relief: first, a declaratory judgment that CalSavers is preempted by ERISA; and second, an injunction

pursuant to California Code of Civil Procedure Section 526a to permanently enjoin spending of taxpayer funds on the Program. Presently before the Court is Defendants' Motion to Dismiss (ECF No. 9) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1),[1] contending, in part, that: (1) Plaintiffs lack standing; (2) the case is not ripe because CalSavers is not yet accepting enrollments; and (3) the CalSavers program does not create an ERISA plan and thus is not preempted. The motion has been fully briefed.

This case presents novel legal questions concerning state-mandated retirement savings accounts. While the matter implicates a significant body of judicial and regulatory interpretations of ERISA, it nevertheless coalesces around a single narrow question: does CalSavers, a state-mandated auto-enrollment retirement savings program, create an "employee benefit plan," such that it is preempted by ERISA? For the reasons set forth below, this Court finds that it does not and therefore GRANTS Defendants' Motion to Dismiss.[2]

BACKGROUND

Congress enacted ERISA in 1974 "to promote the interests of employees and their beneficiaries in

[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g).

employee benefit plans" and to "eliminate the threat of conflicting or inconsistent State and local regulation of employee benefit plans." Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers, 903 F.3d 829, 845 (9th Cir. 2018) (citations omitted); see also ERISA, 88 Stat. 832, as amended, 29 U.S.C. §§ 1001–1461. While ERISA does not require employers to provide any minimum set of benefits to employees, if such plans are "established or maintained . . . by any employer," they must conform to various reporting and fiduciary requirements of the Act. Chambers, 903 F.3d at 845 (citing 29 U.S.C. § 1003(a)). Regarding ERISA's effect on State statutes, it "supersedes any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." Chambers, 903 F.3d at 837 (internal citations and quotation omitted) (emphasis added).

The term "employee benefit plan" is "defined only tautologically in the [ERISA] statute . . . being described as 'an employee welfare benefit plan or employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.'" Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8-9 (1987) (citing 29 U.S.C. § 1002(3)). The lack of a definition of "employee benefit plan" led the Department of Labor ("DOL")[3] to "clarify the limits" of an employee pension benefit plan for purposes of ERISA. Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 1003–04 (9th Cir. 2010). This clarification came in the

[3] The DOL Secretary is empowered to enact regulations to carry out the provisions of ERISA. 29 U.S.C. § 1135.

form of a regulatory safe harbor in 1975 ("1975 Safe Harbor"), which exempted certain Individual Retirement Account ("IRA") plans. 29 C.F.R. § 2510.3-2(d); Daniels-Hall, 629 F.3d at 999. Under the 1975 Safe Harbor, employer payroll deductions for remittance to an employee's IRA are exempted from ERISA if:

> (i) No contributions are made by the employer or employee association;
>
> (ii) Participation is completely voluntary for employees or members;
>
> (iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
>
> (iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-2(d)(1). "[A]n employer that qualifies for the [1975 Safe Harbor] is considered not to have established or maintained an employee pension benefit plan . . . [and] would therefore not be considered an employee pension benefit plan" for purposes of ERISA. Daniels-Hall, 629 F.3d at 1003–04. Significant to the Court's analysis here, discussed infra, is that the term

"completely voluntary" is undefined within the 1975 Safe Harbor.

Defendants contend that in recent years a growing number of citizens lack sufficient retirement income. In response, several states began exploring state-run retirement savings programs. In 2012, the California Legislature passed the California Secure Choice Retirement Savings Trust Act, which created the CalSavers program to address the lack of retirement savings for many of the state's citizens. Cal. Gov't Code §§ 100000–100050. CalSavers creates a State-sponsored retirement savings plan for California employees who do not have access to an employer-provided plan. Cal. Gov't Code § 100000(a), (c)–(d). The Program requires an "Eligible employer[4] to "allow employee participation in the [CalSavers] program" via payroll deductions if that employer does not offer a retirement savings program of its own. Cal. Gov't Code § 100032(b)–(d). Eligible employers must automatically enroll their employees and remit payroll deductions to the Program "unless the employee elects not to participate." Cal. Gov't Code § 100032(f)(1). That is,

[4] "Eligible employer" is defined as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, excluding the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities, that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement." Cal. Gov't Code § 100000(d)(1).

employees of Eligible employers are automatically enrolled, but can "opt out" of CalSavers if desired.

Faced with concerns that state-mandated retirement savings programs with "opt out," as opposed to "opt in," enrollments may not be "completely voluntary" as contemplated in the 1975 Safe Harbor, the DOL issued additional regulatory guidance in 2016 ("2016 Safe Harbor") establishing ERISA exemptions for state-sponsored auto-IRAs. See 81 FR 59464 (entitled "Savings Arrangements Established by States for Non-Governmental Employees"). The preamble to the 2016 Safe Harbor explained:

> With regard to the 1975 IRA Payroll Deduction Safe Harbor's condition requiring that an employee's participation be "completely voluntary," the Department intended this term to mean that the employee's enrollment in the program must be self-initiated. In other words, under the safe harbor, the decision to enroll in the program must be made by the employee, not the employer. If the employer automatically enrolls employees in a benefit program, the employees' participation would not be "completely voluntary" and the employer's actions would constitute the "establishment" of a pension plan, within the meaning of ERISA. . . . This is true even if the employee can affirmatively opt out of the program.

81 FR 59464, 59465 (emphasis added). The 2016 Safe Harbor set up a "voluntary" participation standard for "state required and administered programs," such that

"automatic enrollment arrangements with employee opt-out features" would be expressly exempt from ERISA. 80 FR 72006, 72009. That the 2016 Safe Harbor would have exempted CalSavers from ERISA's provisions is undisputed. However, under the Congressional Review Act, Congress passed legislation in 2017 repealing the 2016 Safe Harbor, which the President signed into law.[5] Subsequent to the repeal of the 2016 Safe Harbor, California has continued in its efforts to implement the CalSavers program, which gave rise to this current action.

Plaintiffs filed their Complaint on May 31, 2018 (ECF No. 1), which Defendants moved to dismiss via the present Motion on July 25, 2018. ECF No. 9. After consideration of the Parties' briefs, the Court ordered supplemental briefings concerning interpretations of the 1975 Safe Harbor's "completely voluntary" requirement and how, if at all, this requirement applies to CalSavers, as well as how the principals of conflict and field preemption may apply in the ERISA context. ECF No. 19. Plaintiffs and Defendants filed their supplemental briefs on November 15, 2018. ECF Nos. 21 and 22.

---

[5] See 115 P.L. 35, 131 Stat. 848 ("Congress disapproves the rule submitted by the Department of Labor relating to 'Savings Arrangements Established by States for Non-Governmental Employees' [ ] and such rule shall have no force or effect.") (citation omitted).

STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Because subject matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. United States v. Cotton, 535 U.S. 625, 630 (2002). Accordingly, lack of subject matter jurisdiction may be raised by either party at any point during the litigation, through a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); see also Int'l Union of Operating Eng'rs v. Cnty. of Plumas, 559 F.3d 1041, 1043-44 (9th Cir. 2009). Lack of subject matter jurisdiction may also be raised by the district court sua sponte. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999). Indeed, "courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party." Id.; see Fed. R. Civ. P. 12(h)(3) (requiring the court to dismiss the action if subject matter jurisdiction is lacking).

There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial attack, and a factual attack. Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Thus, a party may either make an attack on the allegations of

jurisdiction contained in the nonmoving party's complaint, or may challenge the existence of subject matter jurisdiction in fact, despite the formal sufficiency of the pleadings. Id.

When a party makes a facial attack on a complaint, the attack is unaccompanied by supporting evidence, and it challenges jurisdiction based solely on the pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to dismiss constitutes a facial attack, the Court must consider the factual allegations of the complaint to be true, and determine whether they establish subject matter jurisdiction. Savage v. Glendale High Union Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). In the case of a facial attack, the motion to dismiss is granted only if the nonmoving party fails to allege an element necessary for subject matter jurisdiction. Id. However, in the case of a factual attack, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." Safe Air for Everyone, 373 F.3d at 1039.

In the case of a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations." Thornill, 594 F.2d at 733 (internal citation omitted). The party opposing the motion has the burden of proving that subject matter jurisdiction does exist, and must present any necessary evidence to satisfy this burden. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). If the plaintiff's allegations of jurisdictional facts are challenged by the adversary in the appropriate manner, the plaintiff cannot rest on the mere

assertion that factual issues may exist. Trentacosta v. Frontier Pac. Aircraft Ind., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (quoting Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)). Furthermore, the district court may review any evidence necessary, including affidavits and testimony, in order to determine whether subject matter jurisdiction exists. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); Thornhill, 594 F.2d at 733. If the nonmoving party fails to meet its burden and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

B. Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id.

(internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright & Miller, supra, at 94, 95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

C. Leave to Amend

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility. . . .")).

ANALYSIS

A. Standing

Defendants move under both Rules 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim, asserting that Plaintiffs lack

Article III and ERISA standing. Article III standing, unlike statutory standing, is a jurisdictional requirement that Plaintiffs, as the parties invoking federal jurisdiction in this matter, have the burden of establishing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). It requires not only an injury in fact, but also a causal connection between Defendants' conduct and a showing that action by the Court can redress that injury:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not conjectural or hypothetical." . . . Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (internal citation and formatting omitted).

Here, HJTA asserts standing as an employer of California workers, as well as associational standing based on its members. ECF No. 16 at 2, 10. HJTA Employees allude to standing as California taxpayers. Id. at 5. Conversely, Defendants contend that each Plaintiff lacks standing because CalSavers is not open for

enrollment and therefore no injury could have been caused by the Program.[6] ECF No. 9 at 9. As to HJTA's associational standing, Defendants argue that the issues presented in this case are not germane to HJTA's purpose as an organization (i.e., taxpayers' rights). ECF No. 18 at 4–5. Finally, Defendants additionally argue that HJTA Employees lack standing because even if CalSavers creates an ERISA plan, they are not "participants" in the plan because they are not enrolled. Id. at 10–11.

As to the HJTA Employees, the Court finds that they lack standing. They are not yet participating in an ERISA plan, and their potential injuries, if any, are too remote to confer standing. See Miller v. Rite Aid Corp., 504 F.3d 1102, 1105–06 (9th Cir. 2007) ("civil action under ERISA may be brought by a 'participant' in or 'beneficiary' of an ERISA plan . . . [and] [w]e have repeatedly held that whether a living party is a 'participant' or 'beneficiary' is determined as of the time the lawsuit is filed.") (emphasis added). Also, Plaintiffs cannot assert taxpayer standing to gain access to Federal Court. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 346 (2006).

Turning to HJTA's contentions regarding associational standing, the Court agrees with Defendants that the issues presented in this case are not germane to HJTA's purpose such that it would be able to assert standing on behalf of its members. However, the Court

[6] Enrollment was projected to begin by the end of 2018 or early 2019. ECF No. 9 at 4.

nonetheless further finds that HJTA does have standing as an "Eligible employer" under the Program. If CalSavers does not create an ERISA plan, HJTA lacks ERISA standing—however, if the Program does create an ERISA plan, HJTA has both Article III and statutory standing as a potential plan fiduciary. The arguments concerning HJTA's ERISA standing thus intertwine with the ultimate preemption questions of this case, and touch upon substantive elements of HJTA's claims. Precedent supports treating these situations as "nonjurisdictional" because HJTA's "statutory standing or lack thereof under ERISA does not affect whether the Court has subject matter jurisdiction . . . [w]hether [a plaintiff] is a [plan] participant for purposes of ERISA is a substantive element of his claim, not a prerequisite for subject matter jurisdiction." Leeson v. Transamerica Disability Income Plan, 671 F.3d 969, 971 (9th Cir. 2012). Accordingly, for present purposes, the Court finds that HJTA has standing as a potential ERISA plan fiduciary.

B. Ripeness

The doctrine of ripeness is also a jurisdictional concept designed "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements" that do not yet rise to the level of a concrete case or controversy. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580 (1985). Whereas standing is concerned with whether the right party is suing, ripeness hinges on whether the lawsuit is brought at the proper time. See id. (citing Regional Rail

Reorg. Act Cases, 419 U.S. 102, 140 (1974)). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. U.S., 523 U.S. 296, 300 (1998), citing Thomas, 473 U.S. at 580–81. The ripeness inquiry has thus been characterized as "standing on a timeline" in which the key determination is whether the case and controversy is such that judicial intervention is necessary. Bova v. City of Medford, 564 F.3d 1093, 1096 (9th Cir. 2009). Consequently, while ripeness and standing are related concepts and tend to significantly overlap, particularly in pre-enforcement challenges to laws and regulations, they still should be addressed separately. See, e.g., Eternal Word Tel. Network, Inc. v. Sebelius, 935 F. Supp. 2d 1196, 1213 (N.D. Ala. 2013).

Defendants contend that this case is not ripe because enrollments have not yet occurred, CalSavers' Board of Directors has not published final regulations, and HJTA would not be subject to CalSavers' requirements for at least 36 months given its current number of employees. ECF No. 9 at 8. Plaintiffs of course disagree, pointing to the 2012 statute that created CalSavers and which provides that the Program "is approved by the Legislature and implemented as of January 1, 2017." Cal. Gov't Code § 100046 (emphasis added). Plaintiffs have the better argument. CalSavers was enacted in 2012, is "implemented" as of 2017, and is on the eve of enrolling its first participants. Its most contentious requirement—the mandatory auto-enrollment feature—is already established. Furthermore, if

CalSavers creates an ERISA plan, the harm to HJTA in becoming a forced fiduciary would be "reasonable and imminent, and not merely theoretically possible." ProtectMarriage.com – Yes on 8 v. Bowen, 752 F.3d 827, 838–39 (9th Cir. 2014); see also Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 945 (2016) ("[a] plan need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs."). Therefore, the Court finds that this case is ripe for adjudication.

C. Preemption

The heart of the parties' dispute ultimately lies in their preemption arguments. The Court first addresses the 1975 Safe Harbor's application to CalSavers, then turns to an analysis of preemption in the ERISA context.

1. CalSavers is not entitled to the exemptions set forth in the 1975 Safe Harbor.

If CalSavers meets the requirements of the 1975 Safe Harbor, ERISA does not preempt it. The 1975 Safe Harbor outlined four requirements for ERISA exclusion of employer payroll deduction IRAs: (1) no employer contributions are allowed; (2) employee participation must be "completely voluntary"; (3) the employer cannot endorse the program; and (4) the employer cannot receive compensation from the program. 29 C.F.R. § 2510.3-2(d). Only one of these factors—

whether CalSavers is completely voluntary—is at issue here.

Plaintiffs contend that if employers automatically enroll their employees into CalSavers, as is mandated by the California law, the Program is not completely voluntary and thus establishes an ERISA plan. ECF No. 16 at 15–16. Indeed, the preamble to the 2016 Safe Harbor explained that the new regulation was necessary because state-mandated IRAs with auto-enrollment features would fall outside the provisions of the 1975 Safe Harbor. 81 FR 59464, 59465. This arises from the DOL's 2016 interpretation that "completely voluntary" under 1975 Safe Harbor requires that the employee initiate participation. Yet, no other authorities support this interpretation of "completely voluntary" with regard to state action; Plaintiffs did not give any, and simply rely upon the 2016 Safe Harbor to support this premise. <u>See</u> ECF No. 16 at 15. An agency's interpretation of its own regulation is given significant deference. <u>See</u> <u>Udall v. Tallman</u>, 380 U.S. 1, 16 (1965) ("[w]hen the construction of an administrative regulation rather than a statute is in issue, deference [to the agency charged with its administration] is even more clearly in order."). However, in repealing the 2016 Safe Harbor pursuant to the Congressional Review Act, Congress repealed the DOL's interpretation of the matters at issue here, making determining congressional intent more difficult.

That said, based on the record as a whole, the Court declines to hold that CalSavers is subject to the exemptions afforded by the 1975 Safe Harbor. But that

does not end the Court's analysis if resort to a safe harbor is unnecessary in the first place. Accordingly, it must still examine Plaintiff's claims under traditional federal preemption principles.

2. Regardless of Whether CalSavers is Covered by the 1975 Safe Harbor, it is Still Not Preempted by ERISA.

The Ninth Circuit has recently held that "under the modern approach a state law is not preempted merely because it has a literal 'connection with' an ERISA plan. . . . Instead, the law must actually 'govern[] . . . a central matter of plan administration' or 'interfere[] with nationally uniform plan administration.'" Chambers, 903 F.3d at 847 (citation omitted) (citing Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016)) (emphasis in original). Neither of these prohibited actions occur as a result of CalSavers.

Here, Eligible employers are required to adhere to the administrative requirements of CalSavers, but because the Program only applies to employers without existing retirement plans, no ERISA plans are "governed" or "interfered" with because of the statute. See Cal. Gov't Code § 100032(g)(1) ("An employer that provides an employer-sponsored retirement plan . . . shall be exempt from the requirements of [CalSavers]."). The primary purposes of ERISA are to (1) protect the interests of employees in receiving the benefits promised by an employer and (2) protect employers from the burdens of meeting multiple regulatory requirements for

managing ERISA plans. Chambers, 903 F.3d at 845. Yet, Eligible employers are not required to make any promises to employees—they simply remit payroll deducted payments to the Program and otherwise have no discretion regarding the funds. Such ministerial duties fall outside of scope of conduct that Congress intended to regulate in enacting ERISA. See Golden Gate Rest. Ass'n v. City & Cty. of S.F., 546 F.3d 639, 650 (9th Cir. 2008) ("It is within the exercise of [ ] discretion that an employer has the opportunity to engage in the mismanagement of funds and other abuses with which Congress was concerned when it enacted ERISA.").

Defendants cite several cases tending to show that state mandates concerning employee benefits are not preempted if the law does not force employers to create or alter ERISA plans. In Golden Gate, the court upheld a San Francisco ordinance requiring employers within the city to make minimum health care expenditures on behalf of their employees. 546 F.3d at 642. Employers who met minimum spending requirements via other methods (such as existing ERISA plans) were not required to make additional payments, but employers who did not were required to make payments to a City-administered health care program. Id. at 643–46. The ordinance required employers to track workers who performed qualifying work within the city, to include the number of hours worked and calculations on previously paid health care expenditures. Id. at 651. In finding that the ordinance did not create an ERISA plan, the court provided that, "[a]n employer's administrative obligations under the City-payment option do not

run the risk of mismanagement of funds or other abuse . . . [and that] . . . maintaining these records amount[ed] to nothing more than the exercise of 'a modicum of discretion.'" Golden Gate, 546 F.3d at 651.

In Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), the Court found that a Maine statute requiring employers who closed factories within the State to give one-time severance payments to impacted employees did not "relate to any employee benefit plan," and thus was not preempted by ERISA. The Court reasoned, "[i]f a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems." Id. at 19.

While Plaintiffs rely on Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) to support the contention that CalSavers falls within ERISA's provisions, this reliance is misplaced. The Donovan court provided that, a "plan, fund, or program under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Id. at 1373. However, the Ninth Circuit declined to apply this test when considering government mandates on employers, stating that "[w]e would be very hesitant to hold that the Donovan criteria apply to statutory administrative burdens imposed on an employer where, as here, that employer has made no promises whatsoever to its employees. . . ." Golden Gate, 546 F.3d at 652. This Court holds the same hesitation here.

Finding that ERISA preempts CalSavers would be out-of-step with the underlying purposes of the Act. CalSavers does not govern a central matter of an ERISA plan's administration, nor does it interfere with nationally uniform plan administration. On this basis, the Court finds that CalSavers is not preempted by ERISA. Accordingly, Defendants' Motion to Dismiss is GRANTED.[7, 8]

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss (ECF No. 9) is GRANTED. Because CalSavers is not subject to preemption under ERISA, the Court further finds that providing Plaintiffs leave to amend would be futile. Accordingly, Plaintiffs' claims are hereby DISMISSED with one final leave to amend. The Court is very aware of the importance of this case and considered granting this motion without leave to amend. However, notwithstanding the Court's concern, allowing one final opportunity to amend may be in the

[7] Under Federal Rule of Evidence 201, a court may take judicial notice of matters which are "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). For purposes of the present Motion, Defendants' Requests for Judicial Notice ("RJN"), ECF Nos. 10 and 23, and Plaintiffs' RJN, ECF No. 17, are GRANTED.

[8] Defendants raise other contentions that Plaintiffs' claims are barred by the Eleventh Amendment. ECF No. 9 at 2, 19-20. However, given the ruling on Defendants' Motion, the Court finds it unnecessary to address these arguments.

parties' best interest. Plaintiffs will have twenty (20) days from the date this order is electronically filed to file an amended complaint. If no amended complaint is filed within said time period, this case will be dismissed without leave to amend with no further notice to the parties.

IT IS SO ORDERED.

Dated: March 28, 2019

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD JARVIS TAX-PAYERS ASSOCIATION; et al., Plaintiffs-Appellants, v. CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM; JOHN CHIANG, California State Treasurer, Defendants-Appellees.	No. 20-15591 D.C. No. 2:18-cv-01584-MCE-KJN Eastern District of California, Sacramento ORDER (Filed Jun. 15, 2021)

Before: HURWITZ and BRESS, Circuit Judges, and CORKER,* District Judge.

Judges Hurwitz and Bress voted to deny the petition for rehearing en banc, and Judge Corker so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

* The Honorable Clifton L. Corker, United States District Judge for the Eastern District of Tennessee, sitting by designation.

29 U.S.C. § 1002 (1)(2)(5)(9)(32)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USCS § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

. . .

(2)

(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of the Internal Revenue Code of 1986 [26 USCS § 457(e)(11)(D)(ii)])

making payments or supplements described in section 457(e)(11)(D)(i) [26 USCS § 457(e)(11)(D)(i)] of such Code, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of such Code [26 USCS § 457(f)(4)(C)]) making payments of benefits described in section 457(f)(4)(A) of such Code [26 USCS § 457(f)(4)(A)], shall, for purposes of this title, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(C) A pooled employer plan shall be treated as—

(i) a single employee pension benefit plan or single pension plan; and

(ii) a plan to which section 210(a) [29 USCS § 1060(a)] applies.

. . .

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

. . .

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

. . .

(32) The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669). The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986 [26 USCS § 7701(a)(40)]), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code [26 USCS § 7871(d)]), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)[.]

(29 U.S.C. § 1002 (LexisNexis, Lexis Advance through Public Law 117-26, approved July 6, 2021, excepting Part V of Subtitle A of Title 10, as added by Public Law 116-283 (effective 1/1/2022) and Public Law 117-2).)

---

115 P.L. 35

Adopted, May 17, 2017

Reporter
115 P.L. 35; 131 Stat. 848; 2017 Enacted H.J. Res. 66; 115 Enacted H.J. Res. 66

UNITED STATES PUBLIC LAWS > 115th Congress – 1st Session > PUBLIC LAW 115-35 > [H.J. Res. 66]

Synopsis

JOINT RESOLUTION

Disapproving the rule submitted by the Department of Labor relating to savings arrangements established by States for non-governmental employees.

Text

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That Congress disapproves the rule submitted by the Department of Labor relating to "Savings Arrangements Established by States for Non-Governmental Employees" (published at *81 Fed. Reg. 59464* (August 30, 2016)), and such rule shall have no force or effect.

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

81 FR 59464, 59476-59477

(August 30, 2016)

List of Subjects in 29 CFR Part 2510

Accounting, Employee benefit plans, Employee Retirement Income Security Act, Pensions, Reporting, Coverage.

- For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as set forth below:
  - **PART 2510 – DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER**
- **1.** The authority citation for part 2510 is revised to read as follows:
  - **Authority:** 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order No. 1-2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3-101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), E.O. 12108, 44 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Sec. 2510.3-38 is also issued under sec. 1, Pub. L. 105-72, 111 Stat. 1457 (1997).
- **2.** In § 2510.3-2, revise paragraph (a) and add paragraph (h) to read as follows:
  - **§ 2510.3-2 Employee pension benefit plans.**

- **(a)** ***General.*** This section clarifies the terms "employee pension benefit plan" and "pension plan" for purposes of title I of the Act and this chapter by setting forth safe harbors under which certain specific plans, funds and programs would not constitute employee pension benefit plans when the conditions of this section are satisfied. The safe harbors in this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(2). To the extent that these plans, funds and programs constitute employee welfare benefit plans within the meaning of section 3(1) of the Act and § 2510.3-1 of this part, they will be covered under title I; however, they will not be subject to parts 2 and 3 of title I of the Act.

* * * * *

- **(h)** ***Certain State savings programs.***
  - **(1)** For purposes of title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement plan (as defined in 26 U.S.C. 7701(a)(37)) established and maintained pursuant to a State

payroll deduction savings program, provided that:

- **(i)** The program is specifically established pursuant to State law;
- **(ii)** The program is implemented and administered by the State establishing the program (or by a governmental agency or instrumentality of the State), which is responsible for investing the employee savings or for selecting investment alternatives for employees to choose;
- **(iii)** The State (or governmental agency or instrumentality of the State) assumes responsibility for the security of payroll deductions and employee savings;
- **(iv)** The State (or governmental agency or instrumentality of the State) adopts measures to ensure that employees are notified of their rights under the program, and creates a mechanism for enforcement of those rights;

- **(v)** Participation in the program is voluntary for employees;
- **(vi)** All rights of the employee, former employee, or beneficiary under the program are enforceable only by the employee, former employee, or beneficiary, an authorized representative of such a person, or by the State (or governmental agency or instrumentality of the State);
- **(vii)** The involvement of the employer is limited to the following:
  - **(A)** Collecting employee contributions through payroll deductions and remitting them to the program;
  - **(B)** Providing notice to the employees and maintaining records regarding the employer's collection and remittance of payments under the program;
  - **(C)** Providing information to the State (or governmental agency or

instrumentality of the State) necessary to facilitate the operation of the program; and

- **(D)** Distributing program information to employees from the State (or governmental agency or instrumentality of the State) and permitting the State (or governmental agency or instrumentality of the State) to publicize the program to employees;

- **(viii)** The employer contributes no funds to the program and provides no bonus or other monetary incentive to employees to participate in the program; [*59477]

- **(ix)** The employer's participation in the program is required by State law;

- **(x)** The employer has no discretionary authority, control, or responsibility under the program; and

- **(xi)** The employer receives no direct or indirect consideration in the form of cash or otherwise, other than

consideration (including tax incentives and credits) received directly from the State (or governmental agency or instrumentality of the State) that does not exceed an amount that reasonably approximates the employer's (or a typical employer's) costs under the program.

- **(2)** A State savings program will not fail to satisfy the provisions of paragraph (h)(1) of this section merely because the program –
  - **(i)** Is directed toward those employers that do not offer some other workplace savings arrangement;
  - **(ii)** Utilizes one or more service or investment providers to operate and administer the program, provided that the State (or governmental agency or instrumentality of the State) retains full responsibility for the operation and administration of the program; or
  - **(iii)** Treats employees as having automatically elected

payroll deductions in an amount or percentage of compensation, including any automatic increases in such amount or percentage, unless the employee specifically elects not to have such deductions made (or specifically elects to have the deductions made in a different amount or percentage of compensation allowed by the program), provided that the employee is given adequate advance notice of the right to make such elections and provided, further, that a program may also satisfy this paragraph (h) without requiring or otherwise providing for automatic elections such as those described in this paragraph (h)(2)(iii).

- **(3)** For purposes of this section, the term State shall have the same meaning as defined in section 3(10) of the Act.

Signed at Washington, DC, this 24th day of August, 2016.

Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

---

29 CFR 2510.3-2(d)

(d) Individual Retirement Accounts. (1) For purposes of title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that—

(i) No contributions are made by the employer or employee association;

(ii) Participation is completely voluntary for employees or members;

(iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and

(iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually

rendered in connection with payroll deductions or dues checkoffs.

(29 C.F.R. § 2510.3-2 (Lexis Advance through the July 19, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 37676, 86 FR 37901, and 86 FR 37918).)

---

29 CFR 2509.99-1(d)

(d) Employer Limitations on the number of IRA sponsors offered under the program. The Department recognizes that the cost of permitting employees to make IRA contributions through payroll deductions may be significantly affected by the number of IRA sponsors to which the employer must remit contributions. It is the view of the Department that an employer may limit the number of IRA sponsors to which employees may make payroll deduction contributions without exceeding the limitations of 29 CFR 2510.3-2(d), provided that any limitations on, or costs or assessments associated with an employee's ability to transfer or roll over IRA contributions to another IRA sponsor is fully disclosed in advance of the employee's decision to participate in the program. The employer may select one IRA sponsor as the designated recipient for payroll deduction contributions, or it may establish criteria by which to select IRA sponsors, e.g., standards relating to the sponsor's provision of investment education, forms, availability to answer employees' questions, etc., and may periodically review its selectees to

determine whether to continue to designate them. However, an employer may be considered to be involved in the program beyond the limitations set forth in 29 CFR 2510.3-2(d) if the employer negotiates with an IRA sponsor and thereby obtains special terms and conditions for its employees that are not generally available to similar purchasers of the IRA. The employer's involvement in the IRA program would also be in excess of the limitations of the regulation if the employer exercises any influence over the investments made or permitted by the IRA sponsor.

(29 C.F.R. § 2509.99-1 (Lexis Advance through the July 19, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 37676, 86 FR 37901, and 86 FR 37918).)

California Government Code § 100000(d)

(d)(1) "Eligible employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, excluding the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities, that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement.

(2) Upon a positive determination pursuant to subdivision (a) of Section 100046, eligible employer means an employer of a provider of in-home supportive services, as regulated by Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code.

(3) "Eligible employer" does not include an employer that provides a retirement savings program as described in subdivision (g) of Section 100032.

California Government Code § 100004(c)

(c) Moneys in the program fund may be invested or reinvested by the Treasurer or may be invested in whole or in part under contract with the board of a California public retirement system, with private money managers, or in myRAs, or a combination thereof, as determined by the board.

California Government Code §§ 100010(a)(8) and (a)(12)

(a) The board shall have the power and authority to do all of the following:

. . .

(8) Retain and contract with the board of a California public retirement system, private financial institutions, other financial and service providers, consultants, actuaries, counsel, auditors, third-party administrators, and other professionals as necessary.

. . .

(12) Collaborate and cooperate with the board of a California public retirement system, private financial institutions, service providers, and business, financial, trade, membership, and other organizations to the extent necessary or desirable for the effective and efficient design, implementation, and administration of the program and to maximize outreach to eligible employers and eligible employees.

California Government Code § 100034(b)

(b) Employers shall not be a fiduciary, or considered to be a fiduciary, over the trust or the program. The program is a state-administered program, not an employer-sponsored program. If the program is subsequently found to be preempted by any federal law or regulation, employers shall not be liable as plan

sponsors. An employer shall not bear responsibility for the administration, investment, or investment performance of the program. An employer shall not be liable with regard to investment returns, program design, and benefits paid to program participants.

California Government Code § 100036

The state shall not have any liability for the payment of the retirement savings benefit earned by program participants pursuant to this title. The state, and any of the funds of the state, shall have no obligation for payment of the benefits arising from this title.

California Government Code § 100043

(a) The board shall not operate the program if the IRA arrangements offered fail to qualify for the favorable federal income tax treatment ordinarily accorded to IRAs under the Internal Revenue Code, or if it is determined that the program is an employee benefit plan under the federal Employee Retirement Income Security Act.

(b)(1) Prior to opening the program for enrollment, the board shall report to the Governor and Legislature the specific date on which the program will start to enroll program participants and that the following prerequisites and requirements for the program have been met:

(A) The program is structured in a manner to keep the program from being classified as an employee benefit plan subject to the federal Employee Retirement Income Security Act.

(B) The payroll deduction IRA arrangements offered by the program qualify for the favorable federal income tax treatment ordinarily accorded to IRA arrangements under the Internal Revenue Code.

(C) The board has defined in regulation the roles and responsibilities of employers in a manner to keep the program from being classified as an employee benefit plan subject to the federal Employee Retirement Income Security Act.

(D) The board has adopted a third-party administrator operational model that limits employer interaction and transactions with the employee to the extent feasible.

(2) The report required by paragraph (1) shall be submitted in compliance with Section 9795.

California Government Code § 100046

The CalSavers Retirement Savings Program is approved by the Legislature and implemented as of January 1, 2017. The board shall consider and utilize the following parameters in designing the program:

(a) The board shall include a provider of in-home supportive services, as regulated by Article 7 (commencing

with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code in the program if the board determines, and the Director of the State Department of Social Services and the Director of the Department of Finance certify, in writing, all of the following:

(1) The inclusion meets all state and federal legal requirements.

(2) The appropriate employer of record has been identified for the purpose of satisfying all the program's employer requirements.

(3) The payroll deduction, described in Section 12302.2 of the Welfare and Institutions Code, can be implemented at reasonable costs.

(4) The inclusion does not create a financial liability for the state or employer of record.

(b) The board shall structure the program so as to ensure the state is prohibited from incurring liabilities associated with administering the program and that the state has no liability for the program or its investments.

(c) The board shall determine necessary costs associated with outreach, customer service, enforcement, staffing and consultant costs, and all other costs necessary to administer the program.

(d) The board shall consult with employer representatives to create an administrative structure that facilitates employee participation while addressing

employer needs, including, but not limited to, clearly defining employers' duties and liability exemption pursuant to Section 100034.

(e) The board shall include comprehensive worker education and outreach in the program, and the board may collaborate with state and local government agencies, community-based and nonprofit organizations, foundations, vendors, and other entities deemed appropriate to develop and secure ongoing resources for education and outreach that reflect the cultures and languages of the state's diverse workforce population.

(f) The board shall include comprehensive employer education and outreach in the program, with an emphasis on employers with fewer than 100 employees, developed in consultation with employer representatives, with the integration of the following components:

(1) A program internet website to assist the employers of participating employees.

(2) A toll-free help line for employers with live and automated assistance.

(3) Online internet web training.

(4) Live presentations to business associations.

(5) Targeted outreach to small businesses with 10 or less employees.